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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

VICTOR J. FELICE,

Petitioner,

VS.

WILLIAM E. FOLEY, JOSEPH H. SPANIOL, JR., PETER McCABE, ESTATE OF MARSHALL NEILL, J. ROBERT FALLQUIST, SANDY SANDULO, and SMITHMORE P. MYERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the United States District Court Judge, United States District Court Clerks, and Administrative Officers of the United States Courts are each summarily entitled to absolute judicial immunity?

II. Whether a part-time United States Magistrate can be summarily removed without cause during his statutory four year term of office?

III. Whether the United States District Court Clerks, Administrative Officers of the United States Courts, and United States Magistrate, as federal officials, are entitled to protective orders enjoining Petitioner from all discovery authorized by the Federal Rules of Civil Procedure, and there has been no claim of privilege, nor any stated federal government subject matter in need of such judicial protective court order?

IV. Whether Respondents, as federal officials, are entitled to a motion for summary judgment on Petitioner's pleadings for failure to state any claim against the federal officials and whether Petitioner failed to state any claim under Federal Rules of Civil Procedure, Rule 12(b)(6)?

V. Whether Petitioner has been denied due process of law under the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 3

STATEMENT OF THE FACTS 5

REASONS FOR GRANTING THE WRIT 12

I-A ABSOLUTE JUDICIAL IMMUNITY 12

I-B QUALIFIED IMMUNITY 19

II-A APPOINTMENT OF UNITED STATES MAGISTRATES 23

II-B REMOVAL OF UNITED STATES MAGISTRATES 24

III. DISCOVERY UNDER FEDERAL RULES OF CIVIL PROCEDURE 35

FEDERAL RULES RELEVANT TO DISCOVERY 38

IV. FEDERAL RULES OF CIVIL PROCEDURE MOTION FOR DISMISSAL OF PLEADINGS UNDER RULE 12(b)(6) 44

FEDERAL RULES OF CIVIL PROCEDURE, RULE 8(a) 49

2A MOORE'S FEDERAL PRACTICE §8.97, §8.13 SHORT AND PLAIN STATEMENT OF CLAIM. 50

V-A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW. 55

V-B DENIAL OF DISCOVERY 58

CONCLUSION 59

APPENDICES 62

APPENDIX A. MEMORANDUM OF UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

APPENDIX B. ORDER OF UNITED STATES DISTRICT COURT.

APPENDIX C. PETITIONER'S UNITED STATES DISTRICT COURT AMENDED COMPLAINT.

APPENDIX D. PETITIONER'S WASHINGHTON STATE SUPERIOR COURT AMENDED COMPLAINT.

APPENDIX E. REPORTS OF THE PROCEEDINGS OF JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 1977, AND SEPTEMBER 1978.

APPENDIX F. STANDARDS AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES, MARCH, 1978 AND ADMINISTRATIVE OFFICE OF UNITED STATES DISTRICT

COURTS, TRANSMITTAL NO. 32, VOL. I, JANUARY 10, 1979.

APPENDIX G. ORDER REAPPOINTING PETITIONER PART-TIME MAGISTRATE, JANUARY 24, 1979.

APPENDIX H. LETTER OF MAY 7, 1979, TERMINATING PETITONERR'S PART-TIME 4-YEAR TERM OF OFFICE.

APPENDIX I. REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ESTABLISHING STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES, MARCH 5, 1980.

TABLE OF AUTHORITIES

A & A Concreter, Inc., v. White Mountain Apache Tribe, 676 F.2d 1332 (9th Cir. 1982); 47

Burnes v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973). 40

Butz v. Economu, 438 U.S. 478, 511-17 (1978). 15-20

Conley v. Gibson, 355 U.S. 41, 102 (1957). 51

Dear v. Lock, 128 Ill.App.2d 356, 262 N.E.2d 27 (1970). 17

Doe v. McMillan, 412 U.S. 306 (1973). . . 16

Franklin v. State of Oregon State Welfare Division, 662 F.2d 1347 (9th Cir. 1981). . 47

Gomez v. Toledo, 446 U.S. 635 (1980) . . . 22

Gordon v. National Youth Work Alliance, 675 F.2d 356, 367 (D.C. Circuit 1982). 40

Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974. . . . . 15 17,20

Harlow v. Fitzgerald, U.S.___, 102 S.Ct. 2727 (1982). 22

Henricksen v. Bently, 644 F.2d 852, 856, (1981). 22

In re Aircrash in Bali, 684 F.2d 1301, 1314 (9th Cir. 1982). 53

Jackson Sawmill Vo. v. United States, 580 F.2d 302, 306 (8th Cir. 1978). 47

Laswell v. Brown, 686 F.2d 261 (8th Cir. 1982). 47

Marty Adult World New Britan, Inc. v. Guida, 453 F.Supp. 810 (D.Conn. 1978). . . 16

Maruo v. County of Kittitas, 26 Wn.App. 538, 613 P.2d 195 (1980). 21
McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972). 19

Murry v. Amoco Oil Co., 539 F.2d 1385 (5th Cir. 1976). 54

Rankin v. Howard, 633 F.2d 844, 847 (9th Cir.). 15,17

Richardson v. Koshioa, 693 F.2d 911 (9th Cir. 1982). 21

Robinson v. MFA Mutual Insurance Co., 629 F.2d 497, 500 (8th Cir. 1980). 47

Salter v. Upjohn Co., 593 F.2d 651 (5th Cir. 1979). 40

Schever v. Rhodes, 416 U.S. 232 (1974). .. 47

Schuler v. ULSL, 617 F.2d 605, 606 N.3 (D.C. Cir. 1979). 53

Siehan v. Board of Trustees of Bloomsburg St. College, 538 F.2d 53 (3rd Cir. 1976).. 20

Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976). 53

Stump v. Sparkman, 435 U.S. 349, (1978). 16

Thomas v. Younglove, 545 F.2d 1171,1173, (9th Cir. 1976). 22

Williams v. Wood, 612 F.2d 982 (5th Cir. 1980). 20

Wood v. Strickland, 420 U.S. 308, 322 (1975). 21

UNITED STATES MAGISTRATE ACT

28 U.S.C. 1254(1). 3
28 U.S.C. § 631 3
28 U.S.C. § 631(a) 3,23
28 U.S.C. § 631(e) 3,23
31, 34

28 U.S.C. § 631(i) 3, 13
27, 28,31
56

28 U.S.C. § 633. 3

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8 3
Rule 8(a). 49
Rule 12(b)(6). 3,
14, 44

Rule 12(c) 52
Rule 12(e) 52
Rule 12(f) 52
Rule 26(a) 3, 38
Rule 26(b) 38
Rule 26(c) 3, 38
Rule 26(d) 3
Rule 30(a) 4, 39
Rule 45(a) 4, 39
Rule 45(b) 4, 39

United States Code Congressional and Administrative News, Vol. 3, 1968, Legilative History of Magistrate Act, pages 4552, 4254, 4257, 4259, 4260. . . . . .4, 29

Reports of the Proceedings of the United States Judicial Conference, September 15, 16, 1977 and September 21, 22, 1978. 4

March 1978, Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates. 4

January 10, 1979, Administrative Office of United States Courts, Transmittal 32, Vol. I. 4

March, 1980, Regulations of the Judicial Conference of the United States Establishing Standards and Proceedings for the appointment of United States Magistrates, March 5, 1980, Page 6 5

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 5, 55

Wright & Miller, Federal Practice and Procedure, §1356, 592. 53

4J. Moore & Lucas, Moore's Federal Practice 26.69 (3ed. 1976). 40

4 Moore's 26.25 (2). 42

2A Moore's Federal Practice § 8.97 ¶8.13. . 50

IN THE

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WILLIAM E. FOLEY, JOSEPH H. SPANIOL, JR., PETER McCABE, ESTATE OF MARSHALL NEILL, J. ROBERT FALLQUIST, SANDY SANDULO, and SMITHMORE P. MYERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Victor J. Felice, respectfully prays that a Writ of Certiorari be issued to review the Order of the United States District Court and Memorandum of the United States Court of Appeals, for the Ninth Circuit.

OPINION BELOW

On the 30th day of July, 1984, the United States Court of Appeals, Ninth Circuit, by its Memorandum, affirmed United States District Court Judge Edward C. Reed, Jr's summary dismissal, on the pleadings alone, all of Petitioner's State and Federal Amended Complaints against the federal officials on the following grounds: 1) The pleadings failed to state any claim under Federal Rules of Civil Procedure, Rule 12(b)(6); and 2) All of the Respondents, as federal officials, have absolute judicial immunity against Petitioner's civil suits. The Ninth Circuit Memorandum affirmed the dismissal of the pleadings for their failure to state any claim against the federal officials and failed to state a claim of any constitutional violation.

JURISDICTION

The Petition for Writ of Certiorari is being filed within 90 days of July 30, 1984.

The Supreme Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Magistrate Act, 28 U.S.C. § 631:

   28 U.S.C. § 631(a) Appointment and Tenure.

   28 U.S.C. § 631(e) Term of Office.

   28 U.S.C. § 631(i) Removal of Magistrate.

   28 U.S.C. § 633 Determination of Number, Locations.

2. Federal Rules of Civil Procedure

   Rule 8, General Rules of Pleading.

   Rule 12(b)(6), Motion for Judgment on the Pleadings.

   Rule 26(a), Discovery Methods.

   Rule 26(b), Discovery Scope and Limits.

   Rule 26(c), Protective Orders.

   Rule 26(d), Subpoena for taking Depositions.

Rule 30(a), Depositions upon Oral Examination.

Rule 45(a), Subpoena, Attendance of Witness.

Rule 45(b), Subpoena, Production of Documentary Evidence.

3. United States Code Congressional and Administrative News, Vol. 3, 1968, Legilative History of Magistrate Act, pages 4552, 4254, 4257, 4259, 4260.

4. Reports of the Proceedings of the United States Judicial Conference, September 15, 16, 1977 and September 21, 22, 1978 (Appendix E).

5. March 1978, Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates (Appendix F).

6. January 10, 1979, Administrative Office of United States Courts, Transmittal 32, Vol. I (Appendix F).

7. March, 1980, Regulations of the Judicial Conference of the United States Establishing Standards and Proceedings for the appointment of United States Magistrates, March 5, 1980, Page 6 (Appendix I).

8. Fifth Amendment to the United States Constitution - "No person shall be deprived of life, liberty or property without due process of law."

STATEMENT OF THE FACTS

January 24, 1979, Federal District Court Judge Marshall Neill and Judge Jack Tanner, reappointed Magistrate Victor J. Felice to his third four year term as the part-time United States Magistrate (CR 40 C82-346) (CR 39 C82-400) (Appendix G).

February 1, 1979, Magistrate Victor J. Felice commenced this four year term as part-time United States Magistrate for the Eastern District of Washington.

May 7, 1979, Judge Marshall Neill, by a letter, informed Magistrate Felice for the first time, that the part-time position of United States Magistrate for the Eastern District of Washington, at Spokane, had been upgraded to a full-time magistrate position (CR 40 C82-346) (Cr 39 C82-400). The letter further notified Magistrate Felice that he had received authority for the immediate appointment of the full-time magistrate and he had selected Mr. Smithmore P. Myers, 65 years of age, as the new full-time United States Magistrate, and Petitioner's four year term as United States Magistrate would terminate upon the qualification of Mr. Myers (Appendix H).

June 4, 1979, Magistrate Smithmore P. Myers commenced his eight year term as the new full-time United States Magistrate.

April 23, 1982, the United States Court of Claims granted the United States Government's Motion for a Summary Judgment

on Petitioner's claim against the United States of America, Case No. 500-80C. Petition for Writ of Certiorari to the United States Supreme Court was denied, No. 82-164.

May 5, 1982, Magistrate Felice filed five civil causes of action in the United States District Court for the Eastern District of Washington, at Spokane, Case No. C 82-346 RJM, and filed similar law suits in Spokane County Superior Court, State of Washington, against the respondents, Case No. 82-201298, later removed to United States District Court, Case No. C 82-400 RJM.

August 11, 1982, District Court Clerk, J. Robert Fallquist, was served by petitioner with a Subpoena Duces Tecum for the taking of his deposition on August 24, 1982.

August 24, 1982, J. Robert Fallquist appeared without any of the subpoened documents and refused to respond to any questions by petitioner's counsel, and the deposition was involuntarily terminated.

September 13, 1982, Judge Richard M. Bilby signed an Order providing:

> IT IS ORDERED that all proceedings in these matters including discovery and the filing of motions and responses thereto are stayed pending the appointment of a judge to handle these cases (CR 33 C82-346) (CR 31 C82-400).

On November 24, 1982, Magistrate Felice filed five Amended Civil Complaints in the United States District Court, Case No. C 82-346 RJM) (CR 40) (Appendix C), and filed three Amended Superior Court Civil Complaints against the Respondents, Case No. C 82-400 RJM (CR 39) (Appendix D). Substance of Petitioner's allegations in his several causes of action against the Respondents, consisted of the following:

Respondents engaged in a conspiracy to unlawfully remove Petitioner as the part-time United States Magistrate to secure

the clandestine appointment for Mr. Smithmore P. Myers to the new eight year term of a full-time United States Magistrate (Appendices C-18 and D-6).

Removal of the Petitioner as part-time United States Magistrate, without cause, was unlawful because it did not comply with statutory procedures mandated by Congress for removal of magistrates only for cause under 28 U.S.C. ¶631(i) (Appendices C-16 and D-10).

Respondents neglected to perform their ministerial duties by neglecting to follow the Standards and Procedures of the United States Judicial Conference for selecting United States Magistrates, one of which was to give public notice and make known to the public the existence of a vacancy for the full-time government position of United States Magistrate for the Eastern District of Washington, at Spokane (Appendices F and C-12).

December 16, 1982, Judge Edward C. Reed, Jr., signed the following order:

(5) All discovery is stayed pending the ruling of this court on whether discovery should be permitted prior to the time the court rules on the motions to dismiss the complaints in the two said actions (CR 45 C82-346) (Cr 50 C-82-400).

January 12, 1983, Judge Edward C. Reed, Jr., signed the following order:

IT IS HEREBY ORDERED THAT:

1. Defendants motion for protective order staying discovery filed on August 20, 1982, is GRANTED as herein set forth.

2. Plaintiff's motion to compel discovery and for sanctions filed August 24, 1982, is DENIED.

3. Defendants' motion to quash subpoena duces tecum to defendants Myers and Sandulo filed August 27, is GRANTED (CR 50 C82-346) (CR 54 C82-400).

The respondents' attorney filed a Motion for Dismissal on the pleadings all of Petitioner's State and Federal civil causes of action against all of the respondents.

On June 2, 1983, without any responsive pleadings by Respondents, or any discovery permitted to Petitioner, Judge Edward Reed, Jr., signed the order granting Respondents' Motion to Dismiss on the pleadings, all of the Amended Complaints of the Petitioner, on the grounds the allegations summarily entitled the Respondents to the doctrine of absolute judicial limmunity, and upon the additional ground the Petitioner's allegations in the Amended Complaints failed to state any possible claim against any of the Respondents upon which relief could be granted under Federal Rules of Civil Procedure, Rule 12(b)(6), (CR 64 C82-346) (CR 67 C82-400) (Appendix B).

July 1, 1983, the Petitioner filed his Notice of Appeal of District Court Judge

Edward C. Reed, Jr.'s summary order of dismissal on the pleadings to the United States Court of Appeals, Ninth Circuit.

July 30, 1984, the United States Court of Appeals, Ninth Circuit, affirmed the United States District Court's summary dismissal on the pleadings all of the Petitioner's Amended Complaints on the grounds the pleadings failed to state any claim against these federal officials or Magistrate Myers (Appendix A).

REASONS FOR GRANTING THE WRIT

I-A ABSOLUTE JUDICIAL IMMUNITY

No trial or hearing was ever held involving Petitioner with any of the Respondents; there were no judicial acts of discretion; no fearless judicial decision making or any other manifestation of a judicial hearing or a judicial proceeding to invoke the privilege of absolute judicial immunity.

The only overt act upon which Respondents could possibly use to establish any foundation for invoking the public policy privilege of absolute judicial immunity, is the letter of May 7, 1979, sent by Judge Marshall Neill to Petitioner, summarily and prematurely terminating without cause, Petitioner's remaining four year term of office as part-time magistrate (Appendix H).

Petitioner's pleadings alleged; conspiracy by the Respondents to remove Petitioner unlawfully from office to secure the clandestine appointment of Mr. Smithmore P. Myers to the new full-time position of magistrate; removal of the Petitioner as part-time magistrate without cause was a violation of law under 28 U.S.C. § 631(i) and Respondents' failure to perform their ministerial duties and failure to follow the Directives of the United States Judicial Conference in selection of a United States

magistrate. The vacancy for a public office in the full-time government position of United States magistrate was never made public until after the secretive selection of Mr. Smithmore P. Myers had been completed, as was required by the United States Judicial Conference (Appendices F and I).

Judge Edward Reed, Jr.'s order did not specify which of Respondents' acts or conduct, as alleged, warranted the granting of the public policy privilege of absolute judicial immunity. Judge Reed's Order of Dismissal granted a blanket coverage of absolute judicial immunity to each and every Respondent for any and all acts alleged in Petitioner's Amended Complaints, which should have been accepted as verities by Judge Reed, and Judge Reed should have denied Respondents' Motion Motion to Dismiss under Rule 12(b)(6).

The characteristic that gave rise to the recognitiion of absolute judicial immunity for judicial officers was the adjudication of controversies between adversaries, Butz v. Economu, 438 U.S. 478, 511-17 (1978).

The purpose and intent of the doctrine of absolute judicial immunity is to insulate the acts of judicial officers from intimidation that might remove their judicial independence so crucial to the public's interest, in principled and fearless decision making. Rankin v. Howard, 633 F.2d 844, 847 (9th Cir.) citing Gregory v. Thompson, 500 F.2d 49, 63 (9th Cir. 1974).

The doctrine of absolute judicial immunity must reconcile two important considerations: 1) Protection of the individual citizens against pecuniary damages caused by actions of officials of the federal government; and 2) the protection of the public interest by

shielding responsible government officers against harrassment and ineveitable hazards of a vindictive or illfounded damage suit brought on account of action taken in the exercise of their official responsibilities. Doe v. McMillan, 412 U.S. 306 (1973).

The United States Supreme Court has made it clear that the doctrine of immunity should not be applied broadly and indiscriminately but should be given sparingly and only under circumstances where it is imperative to protect an official's discretion in making crucial decisions. Gregory. Marty Adult World New Britan, Inc. v. Guida, 453 F.Supp. 810 (D.Conn. 1978).

Judges have long enjoyed an absolute immunity from civil lawsuits arising from judicial actions, such absolute immunity however, extends only to judicial actions and does not include non-judicial activities. Stump v. Sparkman, 435 U.S.

349, (1978); Dear v. Lock, 128 Ill.App.2d 356, 262 N.E.2d 27 (1970).

Judge Reed failed to state in his summary order of dismissal any specific act by any Respondent, or any specific decision to which absolute judicial immunity attached. Public policy privilege of absolute judicial immunity was indiscriminately and broadly extended to non-judicial proceedings and non-judicial personnel committing tortious acts of conspiracy, violation of the laws, neglect and omissions of their duties mandated by the United States Judicial Confernece and in violation of the due process rights of the Petitioner.

Judicial acts within the meaning of the absolute judicial immunity doctrine are normally corrected by an appeal. Rankin v. Howard, 633 F.2d 844, 847 (9th Cir. 1974); Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974.

Without a removal hearing or trial for Petitioner, the redress by way of an appellate process was never available to Petitioner.

Public policy of granting absolute judicial immunity must remain within the confines of a courtroom or hearing room where fearless judicial decisions are to be made and where such fearless decisions are subject to appellate court review.

Absolute judicial immunity is a necessary public policy doctrine in law perpetuating justice in the judicial system. Extension of this public policy doctrine of absolute judicial immunity beyond the courtroom, beyond hearing rooms where there are no adversaries, and where no fearless judicial decisions are to be made, creates a special privileged class of government officials from whom injured citizens do not have a remedy to secure redress for their claims. Absolute judicial immunity must be confined

to the courtrooms and limited to the public policy purpose for which immunity was created. The summary Order of Dismissal by District Court Judge Edward C. Reed, Jr by indiscriminately invoking absolute judicial immunity upon all Respondents should be reviewed by a Writ of Certiorari.

I-B **QUALIFIED IMMUNITY**

There is no immunity from suit for clerks of court in the performance of their ministerial duties, and their duties are generally classified as ministerial and clerks are entitled to no more protection than any other state ministerial functionary who fails to discharge a mandatory duty. McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).

When a court official acts in a capacity in which he is not called upon to exercise judicial or quasi-judicial discretion, he is not entitled to absolute

judicial immunity. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

Respondents claiming immunity have the burden of demonstrating entitlement to it, and of showing that public policy requires an exemption of that scope. Butz v. Economu, 438 U.S. 478 (1978).

Most courts have held that a clerk of court is not clothed with absolute immunity for duties which are essentially ministerial. Williams v. Wood, 612 F.2d 982 (5th Cir. 1980). Court officials acting within their official capacities are entitled to qualified immunity. Qualified immunity does not provide a basis for dismissing the action, but is a matter which must be raised at the trial. Siehan v. Board of Trustees of Bloomsburg St. College, 538 F.2d 53 (3rd Cir. 1976). Thus clerks of court claiming immunity have the burden of demonstrating entitlement to immunity and the burden to present evidence and convince

the trier of fact by a preponderance of the evidence that under the standards of Wood v. Strickland, 420 U.S. 308, 322 (1975), such immunity is controlling. Butz, at 506; Richardson v. Koshioa, 693 F.2d 911 (9th Cir. 1982).

The Respondents were not called upon to exercise judicial or quasi-judicial discretion and under such circumstances, courts have properly refused to extend the protection of absolute judicial immunity, regardless of any apparent relationship of their role to the judicial system, McCray.

Judicial immunity does not protect clerk's of court from negligence for failure to perform a ministerial act. In fact, civil liability would tend to encourage the proper performance of ministerial duties. Maruo v. County of Kittitas, 26 Wn.App. 538, 613 P.2d 195 (1980).

The clerks of court, administrative officers and other supporting personnel may

assert any claimed qualified immunity defense and it raises issues of fact which cannot be resolved at the pleading stage. Thomas v. Younglove, 545 F.2d 1171,1173, (9th Cir. 1976).

Qualified immunity and good faith immunity is an affirmative defense that Respondents have not pleaded nor raised. McCray; Gomez v. Toledo, 446 U.S. 635 (1980); Henricksen v. Bently, 644 F.2d 852, 856, (1981); Harlow v. Fitzgerald, U.S.___, 102 S.Ct. 2727 (1982).

United States District Court Clerks, and administrative officers of the United States Courts are not entitled to absolute judicial immunity and Respondents did not plead or in any way affirmatively assert any right to the public policy privilege of qualified immunity, nor have Respondents shown by pleadings or submitted any evidence, that public policy requires granting such privileged exemption.

The summary Order of Judge Edward C. Reed, Jr., dismissing, on the pleadings, the Amended Complaints of the Petitioner on the grounds of absolute judicial immunity, and Respondent's having failed to plead any defense of qualified immunity, the Order of Dismissal of Petitioner's Amended Complaints on the basis of any asserted claim by Respondents to qualified immunity should be reviewed by a Writ of Certiorari.

II-A APPOINTMENT OF UNITED STATES MAGISTRATES

The United States Magistrate Act, 28 U.S.C. §631(a) and §631(e) provide for appointment and term of the office of United States Magistrate, as follows:

(a) The judges of each United States District Court and the district of the Virgin Islands shall appoint United States Magistrates in such number and to serve at such locations within the

judicial district as the conference may determine under this chapter.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individual as a part-time magistrate shall be for a term of four years. . . .

On January 24, 1979, Petitioner was duly appointed to his seventh consecutive four year term of public office since 1956, and this was the third appointment as a part-time United States Magistrate. Petitioner, without interruption, continued with his duties as he had done during the previous 22 years, as United States Commissioner and United States Magistrate (Appendix G).

II-B REMOVAL OF UNITED STATES MAGISTRATE

May 7, 1979, approximately three and one-half months into the statutory four-year term, Judge Marshall Neill, forwarded a

letter to Magistrate Victor J. Felice informing Magistrate Felice for the first time that the part-time position of United States Magistrate for the Eastern District of Washington, at Spokane, had been upgraded to a full-time magistrate position (CR 40 C82-346) (CR 39 C82-400). The letter further informed Magistrate Felice that he had received authority for the immediate appointment of a full-time magistrate and he had already selected Mr. Smithmore P. Myers, 65 years of age, as the new full-time United States Magistrate, and Petitioner's part-time position as United States Magistrate would terminate upon the qualification of Mr. Myers. This was the first and only pronouncement of a vacancy of this public office of a full-time United States Magistrate position in the Eastern District of Washington, at Spokane (Appendix H).

On June 4, 1979, Magistrate Smithmore P. Myers commenced his eight year term as the

new full-time United States Magistrate for the Eastern District of Washington, at an annual salary of approximately $50,000.

The Memorandum of the Ninth Circuit Court of Appeals proclaimed the conversion by the United States Judicial Conference of the part-time magistrate position to a full-time magistrate position automatically terminated and removed the Petitioner from his remaining four-year term. The Ninth Circuit stated:

> In this case, the Judicial Conference converted part time magistrate position held by Felice into a full-time position. The effect of this action was to terminate the part-time position upon the availability of funds for the new position of full-time magistrate. The imminence of the demise of the part-time position was known by Judge Neill at the time of Felice's

reappointment, and he therefore made Felice's term of office terminable upon the appointment of a full-time magistrate. Every appointment under the Magistrate's Act is subject to expiration upon termination of the office. Since Felice's term of office expired upon the appointment of a full-time magistrate pursuant to the the terms of the appointment and of section 631(i), so did the entitlement. Without that there was no property right subject to the protection of due process (Appendix A-6).

These judicial assumptions are contrary to the statutory mandates and contradict the reports of the United States Judicial Conference. Petitioner's position was converted to full-time and was never terminated (Appendix E).

No law is cited in support of this position, and the Ninth Circuit did not deem it necessary to address the explicit statutory removal procedures of a United States Magistrate as required by Congress under 28 U.S.C. § 631(i), and this statutory procedure does entitle Petitioner to a Constitutional due process removal hearing.

Removal of any United States magistrate during the appointed term of office must be under 28 U.S.C. § 631(i) (formerly (h), which provides as follows:

> (i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. ....Before any order or removal shall be entered a full specification of the

charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council or councils an opportunity to be heard on the charges.

The legislative history of the Magistrate's Act in U.S. Code and Administrative News, 1968, Vol 3.

At page 4254: The U.S. Magistrate system established by S. 945 differs from the commissioner system in the following important ways:

(4) It gives a full-time U.S. magistrate a secure 8-year term of office, and part-time United States Magistrate a secure 4-year term of office; both full-time and part-time magistrates are subject to removal only for cause.

At page 4257: . . . .In addition, title 1 fixes the tenure and terms of office of magistrates, establishes qualifications for the office, delineates the character of

service expected of those appointed, and specifies the circumstances under which a magistrate may be removed from office.

At page 4259: Proposed subsection 631(h) relates to the removal of a magistrate during his term of office. Such removal shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, and shall occur only after a full specification of charges is furnished the magistrate and he is accorded an opportunity to be heard on the charges by the judicial body with power to remove him.

Proposed subsection 631(h) (presently subsection (i)) also distinguishes in its first sentence, between removal of a magistrate and the termination of the magistracy he fills. The former may result only from enumerated shortcomings of the individual holding the office;
but the later results from a determination by the Judicial Conference of the United

States that the office of magistrate is no longer necessary at a particular location under all the circumstances.

Removal of the petitioner as part-time magistrate, without cause, was affirmed by the Memorandum of the Ninth Circuit, concluding as a matter of law, the appointment of the full-time United States magistrate automatically terminated the position of part-time magistrate, and his right to any hearing. In one single paragraph of this memorandum, the Ninth Circuit has destroyed the many years of hard work in obtaining the security for United States magistrates that was not available to United States commissioners. In one single paragraph of this memorandum, the Ninth Circuit totally destroys the statutory 4-year term of appointment under §631(e), and the statutory grounds for removal under §631(i), to justify the premature ouster of Petitioner as a United States magistrate, without

cause. Removal of the petitioner from his part time four-year term of office under the reasoning by the Ninth Circuit, returns the magistrate position back to the commissioner system, in which the former commissioner could be summarily removed, without cause, by any judicial officer inclined to do so.

Had Congress intended termination of a magistrates' locations, would constitute a removal of a magistrate from his 4-year term of office, then there was no useful purpose or need for Congress to enact §631(i) as statutory grounds and procedure for removal of any magistrate for cause. Congress made it clear in the legislative history of the Magistrate Act and the act itself, magistrates had secure terms of office and were to be removed during their term of office only for cause, after a hearing.

Would the termination of the locations of a United States District Court, United States Circuit court, or United States

Supreme Court terminate the lifetime appointments of these federal judges?

Factually and realistically discovery would have shown the termination of the part time magistrate position in the Eastern District of Washington never occurred. The needs for expanding the services of the magistrate were manifested and supported by records of the performance of the Petitioner over the prior years. The newly selected full-time magistrate occupied the same offices of the removed part-time magistrate, serviced the same area and same governmental agencies of the removed part-time magistrate; and performed the same services performed by the removed part-time magistrate. The principal difference in the replacement of Petitioner with another magistrate was the enviable payment of $50,000 annual salary and all expenses paid for full-time magistrate in comparison to a part-time magistrate salary of $21,600.

The statutory four year term of the part-time magistrate was unconditionally established by Congress in §631(e) and not in need of judicial interpretation or need of judicial legislation. Procedures for removal of a part-time magistrate are also clearly specified by Congress in § 631(i). Congress mandated Petitioner's right to a hearing and right to due process of law, all of which have been judicially reduced to a nullity by the Ninth Circuit Memorandum. Respondents have been able to accomplish indirectly the removal of a United States Magistrate through the District Court and the Ninth Circuit Court of Appeals, which the law directly prohibits.

Statutory four year term of the part-time magistrate under 28 U.S.C § 631(e), and the statutory removal provisions of 28 U.S.C. § 631(i), must now be judicially affirmed to firmly establish the meaningfull purposes intended by the Congress of the

United States in the enactment of the Magistrate Act.

The Memorandum of the United States Court of Appeals, Ninth Circuit, in failing to address and failing to acknowledge the mandatory statutory provisions of the United States Magistrate Act, must be reviewed by Writ of Certiorari.

III. DISCOVERY UNDER FEDERAL RULES OF CIVIL PROCEDURE

August 10, 1982, Petitioner filed his Notice of Intent to Depose United States District Court Clerk, J. Robert Fallquist.

August 11, 1982, a Subpoena Duces Tecum was served upon J. Robert Fallquist, for his appearance and to bring with him all documentation, papers, correspondence, inter-office memorandums, or other writitngs pertaining to the following, from 1977, to the date of deposition:

A. The appointment of a United States Magistrate;

B. The appointment of Smithmore P. Myers as part-time and full-time magistrate;

C. The appointment of Victor J. Felice as part-time magistrate (CR C-82-346).

August 24, 1982, Subpoena Duces Tecums were issued for taking the depositions of respondents, United States Magistrate Smithmore P. Myers and Chief Deputy District Court Clerk, Sandy Sandulo on September 7, 1982.

On August 24, 1982, J. Robert Fallquist appeared for his deposition, stated his name and immediately refused to answer any further questions and did not bring with him any of the materials requested by the Petitioner's Subpoena Duces Tecum. The deposition was involuntarily terminated without any permitted discovery by petitioner.

August 27, 1982, respondents moved to quash the subpoenas issued for the taking of the depositions of respondents Mr. Myers and Ms. Sandulo (CR 25 C-82-346).

September 2, 1982, Petitioner filed a Motion for an Order Authorizing Discovery from respondents (CR 30 C-82-346).

September 16, 1982, Judge Bilby signed an order staying all discovery of respondents by Petitioner (CR 32 C82-346).

December 16, 1982, Judge Edward C. Reed, Jr., signed an Order staying all discovery by Petitioner (CR 45 C-82-346).

January 12, 1983, Judge Edward C. Reed, Jr., singed an Order granting respondents Motion to Quash Petitioner's Subpoenas and issued a Protective Order for respondents and denied Petitioner's Motion for Discovery and Motion for Sanctions from the District Court Clerk J. Robert Fallquist for his failure to respond to the Subpoena and discovery deposition.

FEDERAL RULES OF CIVIL PROCEDURE

RELEVANT TO DISCOVERY

Rule 26(a) Methods of Discovery: Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions. . .

Rule 26(b) Scope of Discovery: Parties may obtain discovery regarding any matter not privileged.

Rule 26(c) Protective Orders: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively on matters related to a deposition, the court in the district where the deposition is being taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense including one or more of the following. . . .

Rule 30(a) When Deposition may be Taken: After commencement of the action, any party may take the deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the 30 days after service of the summons and complaint upon any defendant or service under Rule 4(e), except that leave is not required.

Rule 45(a) Subpoena-Attendance: . . .shall command each person to whom it is directed to attend and give testimony at a time and place therein specified..

Rule 45(b) Production of Documentary Evidence: A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

Federal Rules of Civil Procedure are to be construed to secure the just, speedy and

inexpensive determination of every action. Fairness, not excessive technicality, is the guiding principle under Federal Rules of Civil Procedure. Gordon v. National Youth Work Alliance, 675 F.2d 356, 367 (D.C. Circuit 1982).

It is very unusual for a court to prohibit the taking of a deposition altogether and, absent satisfactory circumstances, such an order would likely be error. 4J. Moore & Lucas, Moore's Federal Practice 26.69 (3ed. 1976), Salter v. Upjonn Co., 593 F.2d 651 (5th Cir. 1979).

The general discovery provisions of the Federal Rules of Civil Procedure are to be liberally construed. Burnes v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973).

Petitioner selected discovery under Rule 30, Deposition with Production of Subpoened Documents. The time for taking the deposition was scheduled beyond the 30 days

and was authorized by the rule to be taken without the intervention and without leave of the United States District Court.

Denial of a most commonly accepted practice of discovery from these respondents because they were federal officials, placed them in a privileged class above and beyond the judicial process required of other citizens. The loss is irreperable to Petitioner because all discovery prior to May 7, 1979 was denied.

Judge Reed's Order stated:

> There is certainly no showing at this early stage that plaintiff has attempted to undertake discovery in a manner calculated to unduly harrass or burden the defendants (CR 50 C82-400).

Without good cause shown, as required by Rule 26(c), Judge Reed issued a protective order without any claim or privilege by the respondents, and a protective order against the taking of the deposition and was not

upon any oral or documented evidence received by means of discovery.

Potential benefits of the Rules of Discovery process, none of which were permitted to the Petitioner, are fully set forth in 4 Moore's 26.25 (2).

None of the Federal Rules of Civil Procedure grant special exemption from discovery to federal officials. Had discovery not been judicially enjoined, discovery would have preserved and revealed many relevant evidentiary facts surrounding the summary removal of the petitioner and secret appointment of Mr. Smithmore P. Myers as magistrate. One such revelation would have been, Mr. Smithmore P. Myers was the contemporary boyfriend of the Chief Deputy Federal District Court Clerk, Ms. Sandy Sandulo, prior to his appointment, and Magistrate Myers thereafter became the husband of the respondent, Chief Deputy District Court Clerk, Sandy Sandulo.

Not one word of discovery crossed the lips of the respondents; not one document of the respondent was ever seen or delivered to petitioner by these public officials, and there was no recorded justification for awarding respondents such blanket protective order.

Orders that stayed the Petitioner's pursuit and preservation of information and documents has now resulted in irreparable loss to the Petitioner. Injunctive orders and protective orders should not be invoked to unnecessarily silence discovery from government officials or be used to obstruct Petitioner seeking relief from intentional or tortious acts by these federal officials.

All orders enjoining discovery of federal officials should be reviewed by Writ of Certiorari, and respondents, as federal officers, be ordered to respond equally to the Federal Rules of Civil Procedure in the

discovery process, as required of other litigants.

IV. FEDERAL RULE OF CIVIL PROCEDURE MOTION FOR DISMISSAL OF PLEADINGS UNDER RULE 12(b)(6)

The second ground for Judge Reed's order of June 2, 1982, to dismiss all of the Petitioner's amended complaints was under Federal Rule of Civil Procedure, Rule 12(b)(6), failure to state a claim upon which relief can be granted. The Ninth Circuit Memorandum concluded no claim was stated by Petitioner against these federal officials. Among the allegations of the Petitioner's Amended Complaints are: (Appendices C and D):

Petitioner alleged respondents had the duty of making a public announcement of public employment of the vacancy of a full-time magistrate position in the Eastern District of Washington, at Spokane by publishing such notice, the qualifications

for the vacant position and procedure to be followed in making application, as mandated by the United States Judicial Conference (Appendices F, C-12, and C-13);

Petitioner alleged respondents failed to perform their ministerial duties (Appendix C-13);

Petitioner alleged the secrecy resulted in clandestine appointment of respondent, Mr. Smithmore P. Myers (Appendices C-14, C-18, D-6);

Petitioner alleged his removal as part-time magistrate was unlawful, and without notice or hearing in violation of 28 U.S.C. § 631(i) (Appendices C-16, D-10);

Petitioner alleged appointment of respondent Mr. Myers violated United States Judicial Conference guidelines and directives governing appointment of a full-time magistrate (Appendices F and I);

Petitioner alleged respondents entered into a clandestine conspiracy to unlawfully remove petitioner in violation of the Magistrate Act, 28 U.S.C. §631, and conspired to secure the secret, unopposed, and uncontested appointment of Mr. Smithmore Myers, as the new full-time magistrate (Appendices C-18, D-6, D-7). The conspiracy was partially accomplished by Respondents' failure to follow United States Judicial Conference Standards and Procedures required to appoint a new full-time United States magistrate (Appendices F and I).

There are forty-six allegations by petitioner against respondents in the Amended Complaints filed with United States District Court (Appendix C). There were twenty-six allegations against respondents file in Spokane County Superior Court (Appendix D). Under Rule 12(b)(6), the allegations presented to Judge Edward Reed, Jr., and to the Ninth Circuit was whether or

not these allegations of Petitioner's Amended Complaints, taken as verities, stated any set of facts entitling the Petitioner to any claim for relief against the Respondents. Schever v. Rhodes, 416 U.S. 232 (1974); A & A Concreter, Inc., v. White Mountain Apache Tribe, 676 F.2d 1332 (9th Cir. 1982); Laswell v. Brown, 686 F.2d 261 (8th Cir. 1982); Franklin v. State of Oregon State Welfare Division, 662 F.2d 1347 (9th Cir. 1981).

Judge Edward Reed, Jr., and the Ninth Circuit had four criteria to consider when deciding on whether or not they could grant the defendants' Rule 12(b)(6) motion to dismiss. The criteria are set forth in Robinson v. MFA Mutual Insurance Co., 629 F.2d 497, 500 (8th Cir. 1980), and Jackson Sawmill Vo. v. United States, 580 F.2d 302, 306 (8th Cir. 1978):

> A complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

A complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precission all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.

The questions, therefore, is whether in the light most favorable to the

plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

On a motion to dismiss Petitioner's Amended Complaints, under Rule 12(b)(6), Judge Reed and the Ninth Circuit must assume not only the truth which may be deduced from Petitioner's allegaions, but also all reasonable inferences which may be deduced from those allegations.

FEDERAL RULE OF CIVIL PROCEDURE, RULE 8(a)

GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, shall. . .(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for

the relief to which he deems himself entitled.

2A MOORE'S FEDERAL PRACTICE § 8.97

¶8.13 SHORT AND PLAIN STATEMENT OF CLAIM:

The Federal Rules have avoided one of the sore spots of code pleading. The Federal Courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence or law. All that is required is a short plain statement of the claim showing that the pleader is entitled to relief. This requirement should (8.98) be observed. And, pursuant to Rule 8(e)(1), each avernment of a (8.99) pleading shall be simple, concise and direct (8.101).

There is no requirement that the pleading state "facts" of "ultimate facts" or "facts sufficient to constitute a cause of action".

"The intent and effect of the rules is to permit the claim to be stated in general

terms; the rules are designed to discourage battles over mere forms of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement (8.102). . .

Defendants' Rule 12(b)(6) Motion to Dismiss did not call for a decision on the merits of the allegations of Petitioner's Amended Complaints, but merely a test to determine if Petitioner had stated adequate information in the Amended Complaints.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the test used to determine whether the motions should be granted was stated in Conley v. Gibson, 355 U.S. 41, 102 (1957):

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim

unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Footnote omitted). [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he basis his claim. To the contrary all the Rules require is a short and plain statement of the claim (Footnote omitted) that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . Such simplified notice 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. (Footnote requests noting Rule 12(e); Rule 12(f); Rule 12(c); Rule 16; Rule 26-37; and Rule

15 for methods of specifying both claim and defenses).

The principles of liberality in pleadings has been affirmed in In re Aircrash in Bali, 684 F.2d 1301, 1314 (9th Cir. 1982).

Additionally, any doubts should be resolved in favor of the plaintiff. Schuler v. ULSL, 617 F.2d 605, 606 N.3 (D.C. Cir. 1979); Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976).

All the Petitioner's pleadings and all inferences were resolved against the Petitioner and in favor of the Respondents.

"The Rule 12(b)(6) motion, . . . only tests whether the claim has been adequately stated in the complaint. Thus, on a motion under Rule 12(b)(6), the court's inquiry essentially is limited to the content of the complaint, . . ." Wright & Miller, Federal Practice and Procedure, §1356, 592. The only facts and as verities which the District Court and Court of Appeals can consider are those alleged in the

Petitioner's Amended Complaints. Murry v. Amoco Oil Co., 539 F.2d 1385 (5th Cir. 1976).

Under the cited authorities, the United States District Court and the Ninth Circuit were obligated to accept the allegations of the Petitioner's Amended Complaints as verities. Accepted as true, Respondents engaged in a conspiracy to remove Petitioner in order to secure the secret appointment for the new full-time United States magistrate; unlawfully removed Petitioner; and did commit the other named tortious acts alleged in Petitioner's Amended Complaints. Accepting all of the Petitioner's allegations of the alleged tortious acts as verities, it is most difficult to comprehend how the Ninth Circuit and the District Court concluded as a matter of law, Petitioner failed to state any claim against these federal officials or Mr. Myers.

Considering the allegations of conspiracy, unlawful removal, neglect of duties, and the other alleged tortious acts as verities under Respondents' motion to dismiss under 12(b)(6), Petitioner has clearly stated a claim against Respondents.

Memorandum of the United States Court of Appeals, Ninth Circuit, should be reviewed by a Writ of Certiorari.

V-A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

The Fifth Amendment of the United States Constitution provides "no person shall be deprived of life, liberty, or property without due process of law."

The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding before a tribunal. As defined by Daniel Webster, "a law which hears before it

condemns; which proceeds upon inquiry and renders judgment only after trial."

Under the Magistrate Act, 28 U.S.C. §631(i), the Congress of the United States vested Petitioner with a statutory right to due process of law by a mandated hearing in removal of a magistrate.

The Ninth Circuit Memorandum, Appendix A, held:

> Since Felice's term of office expired upon the appointment of a full-time magistrate pursuant to terms of the appointment and of section 631(i), so did his entitlement. Without that there was no property right subject to the protection of due process.

The Ninth Circuit did not address the statutory right of due process hearing given by Congress for removal for cause and should have found that Petitioner had a vested property right of a 4-year term of office and the right to a due process hearing to be

removed for cause. The Ninth Circuit summarily vacated a vested statutory right without due process of law granted to the Petitioner by the legislative branch of government.

Removal of other United States magistrates for cause only in other districts as provided by law and the removal of Petitioner without cause, as judicially legislated by the Ninth Circuit, substantiates discriminatory procedures against removal of the Petitioner as a magistrate without cause and without a hearing.

The Magistrate Act and the history of its enactment, specifically provided for appointment of part-time United States magistrates for a 4-year term, removable only for cause under 28 U.S.C. §631(i).

The Memorandum of the United States Court of Appeals, for the Ninth Circuit, denying Petitioner's statutory property right and

statutory right to a due process hearing, should be reviewed by a Writ of Certiorari.

V-B. **DENIAL OF DISCOVERY**

Federal Rules of Civil Procedure, Rule 26 et seq., provide the procedures for pre-trial discovery for all litigants. The rules do not exempt federal officials involved in tortious conduct from the subpoena process or discovery.

Denial to Petitioner of discovery and use of the subpoena because Respondents were federal officials is not sanctioned by the rules. Petitioner could not deny Respondents' right to discovery nor secure any injunction against the issuance of a subpoena. Protection by court orders of federal officials approved by the Ninth Circuit and United States district courts are special privileges to federal officials not permitted equally to other litigants.

Court orders enjoining Petitioner's efforts to secure discovery of the

Respondents and voiding subpoenas of witnesses, denied the Petitioner's right to due process of law.

Denial of all discovery and granting immunity to all federal officials from subpoena process by court orders denied Petitioner his Constitutional right to due process of law and should be reviewed by a Writ of Certiorari.

CONCLUSION

1. Removal of Petitioner as a part-time United States magistrate, without cause, and without a hearing as required by 28 U.S.C. §631(i), was unlawful and denied Petitioner his statutory property right without his Constitutional right to due process of law.

2. Public policy privilege of granting absolute judicial immunity must remain within the confines of a judicial proceeding for judicial officers to make fearless decisions, subject to appellate review. Respondents were not summarily on the

pleadings entitled to the public policy privilege of absolute judicial immunity. Qualified immunity was not alleged by Respondents, as required by law, and if so alleged, Respondents have the burden of establishing the public policy need for granting this special privilege.

3. All Federal Rules of Civil Procedure, including but not limited to discovery and subpoena process, are equally applicable to all federal officials.

4. All of the Petitioner's allegations of Respondents' tortious misconduct in the Amended Complaints, under Respondent's motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6), are verities and stated a claim against the Respondents.

The tortious conduct alleged by the Petitioner against the Respondents, as officers of the judicial branch of the

United States Government, and as verities under Respondent's Motion to Dismiss, under Rule 12(b)(6), should not be concealed by court orders denying discovery; should not be silenced by denial of due process of law; and should not be covered up and buried by an unpublished Memorandum of the United States Ninth Circuit Court of Appeals (Appendix A-1).

For the foregoing reasons, Petitioner respectfully submits that the Writ of Certiorari should issue to review the Order of the United States District Court, and the Memorandum of the United States Court of Appeals for the Ninth Circuit, summarily dismissing, on the pleadings, all of the Petitioner's claims against the Respondents.

DATED this 15TH day of September, 1984.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR J. FELICE,	§	
	§	
Plaintiff-Appellant,	§	CA NOS. 83-3934
	§	83-3935
vs.	§	DC No. 82-400
	§	82-346
WILLIAM E. FOLEY, et al.,	§	
	§	MEMORANDUM*
	§	
Defendants-Appellees.	§	

Appeal from the United States District Court for the Eastern District of Washington Honorable Edward C. Reed, Jr. District Judge, Presiding Argued and submitted March 15, 1984.

BEFORE: KENNEDY & CANBY, CIRCUIT JUDGES,

AND NIELSEN** DISTRICT JUDGE.

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written

opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

** The Honorable Leland C. Nielson, United States District Judge for the Southern District of Californai, sitting by designation.

Felice appeals the dismissal of his federal civil rights claim and his pendent state law claims.

At its September 1978 session, the Judicial Conference of the United States approved the conversion of the part-time magistrate position at Spokane, Washngton to full-time status effective upon the availability of appropriated funds. On January 25, 1979, the United States District Court for the Eastern District of Washington reappointed Felice to the position of part-time magistrate at Spokane for a term

commencing February 1, 1979 and ending four year later "or at such earlier date as a full-time magistrate in Spokane may be appointed." About three months later, the Chief District Judge for the Eastern District of Washington notified Felice that a new full-time magistrate had been appointed and that upon his qualification for office Felice's position as part-time magistrate would terminate.

On these facts, Felice alleges that he was denied a liberty and property interest without due process of law in violation of the fifth amendment to the Constitution. In addition, Felice alleges state law claims of outrage and interference with contractual relations and prospective advantage. The district court dismissed both the federal and state claims under Fed. R. Civ. P. 12(b)(6), primarily on grounds of defendants' immunity. However, we need not reach defendants' broad claims of immunity

because the record presents other sufficient grounds upon which to uphold the district court's action. Mollnow v. Carlton, 716 F.2d 627, 628 n.1 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3679 (U.S. March 20, 1984) (No. 83-994).

A cause of action and damage remedy is implied directly under the Constitution when a citizen suffers compensable injury due to the conduct of a federal official that violates the due process clause of the fifth amendment. Davis v. Passman, 442 U.S. 228, 234 (1979). See also Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). But plaintiff must assert that the federal official's conduct deprived him of some interest encompassed within the fifth amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Generally, an employee has no property or liberty interests in continued government

employment. To acquire a protected interest in continued government employment, plaintiff must demonstrate some legitimate claim of entitlement derived from some state or federal statute. Id. at 177. Felice basis his claim of entitlement to the position of part-time magistrate on section 631(e) and (i) of the Magistrate's Act of 1968. 28 U.S.C. § 631(e), (i). Section 631(e) provides inter alia that part-time magistrates shall be appointed for terms of four years. Section 631(i) provides that a magistrate may be removed before the end of the term for which he was appointed only for "incompetency, misconduct, neglect of duty or physical or mental disability." Thus, Felice maintains that his reappointment to the position of part time magistrate gave him a statutory right, protected by the due process clause, to an unconditional four-year term subject only to the removal clause of section 631(i).

This argument sounds persuasive as far as it goes. But it overlooks the fact that a magistrate's office may be terminated before the incumbent's term expires if the Judicial Conference determines that the services of the office are no longer needed, 28 U.S.C. §631(i). Termination, as opposed to removal, is not tied to the incompetence, misconduct, neglect, or disability of the incumbent, and does not entitle him to a hearing. Id, cf. Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam) (purpose of hearing is to provide opportunity to refute charges of misconduct).

In this case, the Judicial Conference converted the part-time magistrate position held by Felice into a full-time position. The effect of this action was to terminate the part-time position upon the availability of funds for the new position of full-time magistrate. The imminence of the demise of the part-time position was known by Judge

Neill at the time of Felice's reappointment, and he therefore made Felice's term of office terminable upon the appointment of a full-time magistrate. Every appointment under the Magistrate's Act is subject to expiration upon termination of the office. Since Felice's term of office expired upon the appointment of a full-time magistrate pursuant to the terms of the appointent and of section 631(i), so did his entitlement. Without that there was no property right subject to the protection of due process.

Neither the statute nor the terms of Felice's appointment secure any interest in appointment to the full-time magistrate's position. Felice's 22 years of prior service as United States Commissioner and then as United States magistrate created in him no more than a "unilateral expectation"; they provide no support, for any claim under the Magistrate's Act that he was entitled to

appointment to the new full-time position. See Roth, 408 U.S. at 577-78.

Felice's termination from the part-time position and nonappointment to the full-time position also did not implicate any liberty interest. The termination and nonappointment were not accompanied by any charge of a stigmatizing nature. Id. at 573. We cannot accept Felice's argument that he was stigmatized by the mere fact that someone else was appointed to the full-time position.

As to Felice's state law claims, the district court properly dismissed the complaint as to those defendants who are federal officials. A federal official is not personally liable in tort for acts committed within the outer perimeter of his line of duty, as these were. Owyhee Grazing Association v. Field, 637 F.2d 694, 697 (9th Cir. 1981); Miller v. DeLaune, 602 F.2d 198, 200 (9th Cir. 1979). Moreover, we find

the dismissal appropriate as to defendant Myers, who was not a federal official at the time relevant to this action, because Felice does not show that Myers did anything other than to accept the position of full-time magistrate to which he has been appointed.

Because we find sufficient alternative grounds to support the district court's judgment, we do not find it necessary to decide the broader question of defendants' immunity for constitutional violations. It is not necessary because plaintiff fails to state a claim of any constitutional violation.[1]/

AFFIRMED.

FOOTNOTE 1. Felice's amended complaint also alleges that defendants' acts denied him equal protection of the laws. This claim was also properly dismissed because it fails to allege that defendants were motivated by a racial or other class-based invidiously discriminatory animus. Mollnow v. Carlton, 716 F.2d at 628.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

VICTOR J. FELICE,	§	
	§	
Plaintiff,	§	No. C-82-346-ECR
	§	No. C-82-400-ECR
vs.	§	
	§	
WILLIAM E. FOLEY, et al.,	§	O R D E R
	§	
Defendants.	§	

This matter is now before the Court upon the defendants' motions made pursuant to Rule 12(b)(6) Fed.R.Civ.P. to dismiss the amended complaints filed in each of the above-captioned cases. In both actions plaintiff, Victor J. Felice, is suing various federal judicial and court administrative personnel because the position he held as part-time magistrate was eliminated prior to expiration of the four-year term to which he was appointed in 1979, and also apparently because he was not

chosen to fill the newly created full-time position.

In the case initially filed in this court, C-82-346-ECR, plaintiff asserts that defendants failed to follow guidelines and directives promugated by the Judicial Conference of the United Statesa pursuant to 28 U.S.C. §631(a) in appointing a new full-time magistrate and seeks damages for violations of the Dur Process Clause of the Fifth Amendment, Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983. In the companion case, C-82-400-ECR, plaintiff attempted to sue in state court only some of the same defendants named in C-82-346-ECR. The case which originated in the state court alleges several theories of tort liability and civil conspiracy. That case was removed to this Court upon timely petition by all of the defendants. 28 U.S.C. § 1441.

The Court first addresses the issues relating to the civil right action, No. C-82-346-ECR.

For purposes of considering the motions of defendants, all facts alleged in the complaint are taken to be true. Because these are motions to dismiss brought pursuant to Rule 12(b)(6), the Court has deemed it appropriate not to consider matters outside the pleadings which have been submitted by the defendants in support of their motions.

Firstly, the Court is convinced that, contrary to assertions made by the defendants, the appropriate statute of limitations which applies here is the three-year period found in Wash.Rev.Code §4.16.080(2). Hence, plaintiff's claims are not barred for failure to bring these actions within two years. Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981). Secondly, since all of the defendants here are federal

officials or employees, 42 U.S.C. §§ 1981 and 1983 have no application and thus the claims purportedly brought under those sections should be dismissed.

The threshold question to be addressed in these motions is the scope of immunity which should necessarily be accorded each of the defendants.

Marshall Neill, formerly Chief United States District Judge for the Eastern District of Washington, is sued herein as the Estate of Marshall Neill. The allegations relating to Judge Neill go to his participation in appointing plaintiff to four-year terms as part-time magistrate in 1975 and 1979 and also alleged correspondence directed to plaintiff informing him that authority had been granted for immediate appointment of a full-time magistrate, that the filling of that position would eliminate that held by

plaintiff, and that another individual had been chosen for the job.

It is well settled that judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their judicial capacities. Stump v. Sparkman, 435 U.S. 349, 355-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). As stated in Rankin v. Howard, 633 F.2d 844, 847 (9th Cir. 1980):

> "The Stump Court identified two specific factors to be considered in determining whether an act is 'judicial': 'the nature of the act itself, i.e., whether it is a function normally performed by a judge, and ... the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.' 435 U.S. at 362, 98 S.Ct. at 1107."

The appointment of United States magistrates is unquestionably a function normally performed by United States district judges as provided by 28 U.S.C. § 631. There is also no question in the context of this case but that all dealings as between plaintiff and Judge Neill were where the Judge was acting in his judicial capacity.

It was recently stated in Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) that " ... when a court official acts in a capacity in which he is not called upon to exercise judicial or quasi-judicial discretion, he is not entitled to absolute immunity." In Richardson, the court refused to extend absolute immunity to members of the Hawaii State Judicial Selection Commission established pursuant to the constitution of that state. Central to the Court's holding was a finding that the function of the Commission in screening applications for juldicial appointments was

executive rather than judicial in nature. Id. at 693 F.2d at 915. To paraphrase the three justifications for absolute judicial immunity established by the Supreme Court in Bradley v. Fisher, 13 Wall. 335 (1872):

> (1) there would be a public degradation of the judiciary and loss of respect if judges were forced to defend their decisions in law suits;
>
> (2) such liability would be intimidating and lessen their independence; and
>
> (3) impeachment procedures provide an adequate remedy for judicial abuses.

In this light it seems clear that the act of appointing a magistrate which is conferred by statute, as well as the other incidental conduct necessarily related thereto, constitutes activity which is within the scope of the judicial duties and responsibilities of a United States district judge, which should be accorded absolute

immunity. Each of the above-cited justifications for judicial immunity supports such a finding.

Richardson v. Koshiba, supra, can be distinguished from the present case on the basis that the defendant members of the Judicial Selection Commission of Hawaii were not judicial officers in the first place and thus could not be accorded immunity for acts which involved "functions [which] bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries." 693 F.2d at 914. Certainly courts have recognized judicial immunity for judges involved in conduct other than the adjudication of cases and controversies.

In the leading case of Bradley v. Fisher, supra, for instance, the defendant judge was sued for striking the plaintiff's

name from the role of attorneys authorized to practice in the District of Columbia. Similarly, in Martin v. Wyzanski, 191 F.Supp. 931 (D Mass. 1961), the court held that a United States district judge had absolute immunity from liability fo acts arising from his official assignment to supervise court reporters. This Court agrees strongly with the rationale set forth therein:

> "it is a matter of common knowledge that the vast growth in the volume of Federal litigation over the years has carried with it the absolute necessity that Federal judges perform and discharge certain administrative duties incident to the proper functioning of the courts over and above presiding at trials. Suffice it to say that the public interest in effective functioning of government and the efficient

> administration of justice wuold be as seriously prejudiced if judges were exposed to liability for administrative acts performed in the course of their official duties as it would be if judges were without immunity as regards the remainder of their judicial duties." 191 Fed. Supp. at 934.

As a matter of pleading the complaint fails to allege any facts which constitute a claim against defendant Smithmore P. Myers. It is alleged only that he accepted the position of full-time magistrate which replaced the position formerly held by the plaintiff. No other facts are set forth regarding conduct on the part of defendant Myers occurring either before or after his appointment to the position of magistrate.

The remaining defendants are alleged to be employees of the Administrative Office of the United States Courts in Washington, D.C. (defendants Foley, McCabe and Spaniol) or of

the office of the Clerk of the Court, United States District Court for the Eastern District of Washington (Fallquist and Sandulo). Generally, "A clerk of a federal court performing routine duites such as entering an order and notifying parties does not enjoy an absolute immunity from damages actions for injuries caused by that conduct." Williams v. Wood, 612 F.2d 982, 984 (5th Cir. 1980). However, a court clerk "may" receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge." Waits v. McGowan, 516 F.2d 203, 206 (3rd Cir. 1975). See also Slotnick v. Garfinkle, 632, F.2d 163 (1st Cir. 1980).

A close reading of the amended complaint reveals that it alleges that defendants Fallquist and Sandulo were at all times acting as agents for Judge Neill. The

complaint also alleges that plaintiff received a letter from Judge Neill in May, 1979:

> "advising him that he had been granted authority for the 'immediate' appointment of a full-time United States Magistrate and that he had selected Smithmore P. Myers as the new full-time United States Magistrate for the Eastern District of Washington, at Spokane, and that Mr. Myers had accepted the position. The plaintiff was also advised by this letter that his part-time position as United States Magistrate would be terminated when the full-time magistrate assumed his office."

Under the circumstances it is clear that the conduct of defendants Fallquist and Sandulo in this case in effect amounted to a ministerial function at the direction of Judge Neill. Since the appointment or

removal of a United States magistrate are matters which may be accomplished only by the action of the United States district judges of the district where the particular magistrate position is located pursuant to 28 U.S.C. s 631(a) and (i), it necessarily follows that ministerial conduct undertaken by court clerks regarding such court action should be accorded absolute judicial immunity from suit.

The Court is unable to find as a matter of law that the remaining defendants, who are alleged to be employees of the Administrative Office of the United States Courts, are entitled to any more than qualififed food faith immunity. Butrz v. Economou, 435 U.S. 478, 98 S.Ct. 2894 57 L.Ed.2d 895 (1978); Harlow v. Fitzgerald, __ _U.S.___, 102 S.Ct. 2727 (1982). Still, the Court is of the view that these three defendants should also be dismissed because the complaint does not state a claim against

them. Beyond general allegations that defendants caused the wrongful and unlawful removal of plaintiff from his positon as part-time magistrate, plaintiff alleges only that said defendants violated plaintiff's consitutional rights by failing to follow certain procedures and guidelines set forth in 28 U.S.C. § 631 as promulgated by the Judicial Conference. Plaintiff fails to allege or otherwise show in his opposition to this motion specifically what provisions of those procedures and guidelines apply to defendants Foley, Spaniol and McCabe; or what personal involvment, if any, those individuals had in the instant matter. The allegations of the complaint are insufficient to state a claim for damages against these defendants for violation of a constitutionally protected interest. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 368, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Even if this Court were to hold that a failure to follow the procedures set forth in 28 U.S.C. § 631 might be tantamount to a violation of the Due Process Clause of the Fifth Amendment, under the circumstances pleaded, there are not sufficient allegations here to indicate that the defendant Director of the Adminsitrative Office of the United States Courts and the other defendant employees of that office failed to properly discharge their duties which are generally set forth in 28 U.S.C. § 604. Again, plaintiff has not by way of allegation shown that these defendants failed to follow any specific provision of 28 U.S.C. § 631, the statutory section relating to the appointment and removal of United States magistrates, which they themselves were obligated to follow. It is clear that the act of appointing or removing United States magistrates to or from office is within the exclusive province of United

States district judges.

The Court does not intend to indicate that the well reasoned procedures and directives regarding the appointment and removal of magistrates as dictated by Congress and promulgated by the Judicial Conference should be ignored or taken lightly. Neither does the Court feel that an aggrieved plaintiff such as Mr. Felice might not be entitled to relief in an appropriate case. See Johnson v. Mishler, 526 F.2d 364 (2nd Cir. 1975) (Writ of Mandamus entered against Chief Judge of the District Court for the Eastern District of New York directing vacation of order terminating probation officer's employment and granting hearing in accordance with the regulations of the Probation Division).

Finally, the companion case, C-82-400-ECR should also be dismissed because, as set forth above, each of the defendants in that action, with the possible

exception of Smithmore P. Myers, is entitled to absolute immunity. That complaint, however, also fails to state a claim against defendant Myers for basically the reason stated herein.

IT IS, THEREFORE, HEREBY ORDERED that the amended complaints in actions Nos. C-82-346-ECR and C-82-400-ECR are DISMISSED. The Clerk of the Court shall enter judgment accordingly.

DATED: May 31, 1983.

/s/ Edward C. Reed.

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

VICTOR J. FELICE, Plaintiff, vs. WILLIAM E. FOLEY AND JANE DOE FOLEY, husband and wife; PETER G. McCABE AND JANE DOE McCABE, husband and wife; ESTATE OF MARSHALL NEILL: J. FALLQUIST AND JANE DOE FALLQUIST, husband and wife; SANDY SANDULO and SMITHMORE P. MYERS Defendants.	§	NO. C-82-346-RJM AMENDED COMPLAINT FOR DAMAGES RESULTING FROM DEFENDANTS MISFEASANCE, NON-FEASANCE, MALFEA-SANCE, WRONGFUL REMOVAL, CONSPIR-ACY AND VIOLAION OF CIVIL RIGHTS.

COMES NOW the plaintiff, VICTOR J. FELICE, and for his FIRST CAUSE OF ACTION against the defendants alleges as follows:

I

The United States District Court for

the Eastern District of Washington has jurisdiction of this proceeding pursuant to 28 U.S.C. §1331, 28 U.S.C. §604, 28 U.S.C. § 1981 and § 1983.

II

Plaintiff is a resident of Spokane County, State of Washington, and at all times relevant hereto was the duly appointed part-time United States Mag strate for the Eastern District of Washington at Spokane.

III

Defendant William E. Foley is a nonresident of the State of Washington and at all times relevant hereto occupied the position of Director of the United States Courts, at Washington D.C. All acts or omissions of defendant William E. Foley, as alleged herein, were done on behalf of and for the benefit of his marital community.

IV

Defendant Joseph F. Spaniol Jr. is a nonresident of the State of Washington, and

at all times relevant hereto occupied the position of Deputy Director of the United States Courts, at Washington D.C. All acts or omissions of defendant Joseph F. Spaniol, Jr. as alleged herein, were done on behalf of and for the benefit of his marital community.

V

Defendant Peter G. McCabe is a nonresident of the State of Washington and at all times relevant hereto occupied the position of Chief of the Magistrate Division in the Office of The United States Courts. All acts or omissions of defendant Peter G. McCabe, as alleged herein, were done on behalf of and for the benefit of his marital community.

VI

Marshall Neill was a resident of Spokane County, State of Washington and at all times relevant hereto occupied the position of Federal Judge for the Eastern

District of Washington, at Spokane. All acts or omissions of Marshall A. Neill, as alleged herein, were done on behalf of and for the benefit of his marital community. Subsequent to the acts and omissions hereinafter alleged Marshall A. Neill died in Spokane County, State of Washington, and his estate was probated under Spokane County Cause No.79401346-5

VII

Defendant J. Robert Fallquist is a resident of Spokane County, State of Washington and at all times relevant hereto occupied the position of District Court Clerk for the Eastern District of Washington, at Spokane. All acts or omissions of defendant J. Robert Fallquist, as alleged herein, were done on behalf of and for the benefit of his marital community.

VIII

Defendant Sandy Sandulo is a resident of

Spokane County, State of Washington, and at all times relevant hereto occupied the position of Chief Deputy Court Clerk for the Eastern District of Washington, at Spokane.

IX

Defendant Smithmore P. Myers at all times relevant hereto has been a resident of Spokane County, State of Washington.

X

The position of United States Magistrate for the Eastern District of Washington, at Spokane, was duly authorized by the United States Congress under 28 U.S.C. §631.

XI

On the 25th day of July, 1956, plaintiff was appointed by Federal District Court Judge Samual Driver to a four year term as United States Commissioner for the Eastern District of Washington, at Spokane. On July 25, 1960, the plaintiff was reappointed for an additional four year term as the

part-time United States Commissioner for the Eastern District of Washington, at Spokane, by Federal Judge Charles Powell. On July 21, 1964, Judge Charles Powell reappointed the Plaintiff as the United States Commissioner for an additional four year term. On July 18, 1968, Federal Judge Charles Powell again reappointed the plaintiff to his fourth consecutive term as United States Commissioner for the Eastern District of Washington, at Spokane.

XII

In October of 1968, Congress enacted the United States Magistrates Act which converted the positions of United States Commissioners to United States Magistrates.

XIII

On March 31, 1971, U.S. District Court Judge Charles Powell appointed the plaintiff to a four year term as the first United States Magistrate for the Eastern District of Washington, at Spokane. On January 24,

1975, the plaintiff was reappointed to an additional four year term as United States Magistrate for the Eastern District of Washington, at Spokane, by Federal District Court Judges Marshall Neill and William Goodwin.

XIV

On or about September 21, 1978, the Judicial Conference of the United States converted the position of part-time United States Magistrate to "full time" magistrate for the Eastern District of Washington, at Spokane.

XV

January 24, 1979, the plaintiff was reappointed as the United States Magistrate for the Eastern District of Washington, at Spokane, to a four year term at Spokane, by Judge Marshall Neill and Judge Jack E. Tanner.

XVI

On February 1, 1979, the plaintiff

commenced his four year term as part-time United States Magistrate at an annual salary of $21,600.00, plus medical coverage, and an opportunity to increase his government retirement pension upon completion of his duly appointed four year term of office.

XVII

On or about May 7, 1979, after approximately 22 years of loyal and dedicated service as the United States Commissioner and Magistrate for the Eastern District of Washington, at Spokane, the plaintiff received correspondence from Federal District Court Judge Marshall A. Neill advising him that he had been granted authority for the "immediate" appointment of a full-time United States Magistrate and that he had selected Smithmore P. Myers as the new full-time United States Magistrate for the Eastern District of Washington, at Spokane, and that Mr. Myers had accepted the position. The plaintiff was also advised by

this letter that his part-time position as United States Magistrate would be terminated when the full-time magistrate assumed his office.

XVIII

This correspondence, received on or about May 7, 1979, by plaintiff from Judge Neill, was the only notice given to plaintiff informing him that the plaintiff had been removed as part-time magistrate.

XIX

This correspondence received on or about May 7, 1979, by plaintiff from Judge Neill, indicating that the part-time position of United States Magistrate had been upgraded to a full-time position was the only correspondence to plaintiff identifying the reason for plaintiff's removal as the encumbent part-time United States Magistrate.

XX

On June 4, 1979, Smithmore P. Myers,

assumed his duties as the newly appointed United States Magistrate for the Eastern District of Washington, at Spokane, for a term of eight years at a salary of approximately $50,000 per annum.

XXI

The Administrative Office of the United States Courts is an agency of government and serves the Judicial Conference of the United States. The Defendants Foley, Spaniol, McCabe, Neill, Fallquist, and Sandulo are agents of the Administrative Office of the United States Courts, and Defendants Fallquist and Sandulo are also the agents of Judge Marshall Neill, and all acts hereinafter alleged were the acts of each individually and within the scope of their respective agency employment.

XXII

At all times herein alleged, defendant FOLEY and defendants SPANIOL, McCABE, FALLQUIST and SANDULO, acting individually

and as the agents of FOLEY, intentionally and wrongfully failed to undertake and perform the duties of their office as hereinafter alleged. The said conduct constituted malfeasance, misfeasance and nonfeasance by the said defendants, and obstructed and denied plaintiff's Fifth Amendment right to due process of law.

XXIII

The acts and ommissions of defendant NEILL, individually, and defendants FALLQUIST, and SANDULO, individually and as agents of Judge Marshall Neill as hereinafter alleged, were within the scope of such agency employment and authority.

XXIV

After 22 years of continuous service as the United States Commissioner and United States Magistrate the plaintiff acquired a liberty interest and a property interest in the position of full-time United States Magistrate for the Eastern District of Wash-

ington, at Spokane, that was converted from plaintiff's part-time magistrate position. The Plaintiff's property interest and liberty interest were entitled to the due process protection under the Fifth Amendment to the Constitution of the United States of America.

XXV

The defendants, upon being informed that the position of full-time magistrate had been approved for the Eastern District of Washington, had the following duties and responsibilities: (1) To make a public announcement that there was a vacancy in the position of a full-time United States Magistrate in the Eastern District of Washington; (2) to give public notice of the magistrate vacancy by publishing notice of the vacancy in a Bar Journal, newsletter, local periodical, or general local newspaper or similar publication; (3) to file and post the notice of the vacancy in the District

Court Clerk's Office of the Eastern District of Washington; (4) to make public the duties of the new Magistrate's position and the qualification standards of the new Magistrates's position; (5) to inform the public of the procedures for submission of applications for this position; (6) to inform the public of the name and address of the person to whom applications must be submitted; (7) to give public notice that applications were to be submitted only by the potential nominee personally, indicating the person's willingness to serve.

XXVI

The defendants failed to perform each and every duty described in paragraph XXV.

XXVII

The defendants not only failed in their duties as above alleged, but kept the vacancy of the new full-time magistrate position and the acceleration of the funding of the new full-time magistrate position

from October 1, 1979, to May, 1979, a complete secret from the plaintiff and from the public.

XXVIII

The above acts of the defendants and the secrecy alledged resulted in the denial to the plaintiff of his right to due process protection under the Fifth Amendment to the United States Constitution and of his property and liberty interests.

XXIX

The defendants' failure in their duties to the public, and to the plaintiff, permitted the clandestine appointment of the defendant, Smithmore P. Myers, as the new United States Magistrate for the Eastern District of Washington, at Spokane, for a term of eight years.

XXX

As a direct and proximate result of the malfeasance, misfeasance, and nonfeasance of the defendants hereinabove set forth,

plaintiff was unconstitutionally deprived of his established liberty interest and property interest all to his damage in excess of $720,000.00, and such specific amounts to be proven at time of trial.

XXXI

As a further direct and proximate result of the malfeasance, misfeasance and nonfeasance of the defendants as hereinabove set forth plaintiff sustained severe mental and emotional pain, anguish, humiliation, embarrassment and stigma as pertains to his competency, integrity, reputation and capacity to carry out his duties of public office, creating innuendos and implications reflecting falsely on his physical and mental capablities all to his damage in amounts to be proven at time of trial.

SECOND CAUSE OF ACTION

As and for his SECOND CAUSE OF ACTION against the defendants plaintiff realleges paragraphs I through XXIX as of plaintiff's

First Cause of Action, as previously set forth, and incorporates the same by reference herein and further alleges:

XXXII

The removal of the plaintiff as the part time United States Magistrate for the Eastern District of Washington at Spokane, was without notice or hearing and all in violation of 28 U.S.C. §631(i).

XXXIII

The appointment of defendant Smithmore P. Myers as full-time magistrate caused the wrongful removal of plaintiff as part-time magistrate in that the termination of plaintiff as part-time magistrate violated the guidelines and directives promulgated by the Judicial Conference governing the appointment of full-time magistrates.

XXXIV

The summary removal of the plaintiff without cause and without any hearing by the defendants was to further the clandestine

appointment of the defendant Smithmore P. Myers as the new United States Magistrate for the Eastern District of Washington, at Spokane.

XXXV

As a direct and proximate result of the unlawful removal of the plaintiff by the defendants the plaintiff sustained loss of income, and other benefits due from the remaining portion of plaintiff's unexpired four year term of office.

XXXVI

As a direct and proximate result of the acts of defendants plaintiff sustained severe mental and emotional pain, anguish, humiliation, embarassment and stigma as pertains to his competency, reputation and capacity to carry out his duties of public office, creating innuendos and implications reflecting falsely on his physical and mental capabilities all to his damage in amounts to be proven at the time of trial.

THIRD CAUSE OF ACTION

As and for his THIRD CAUSE OF ACTION against the defendants plaintiff realleges paragraphs I through XXVIII of the FIRST CAUSE OF ACTION, and paragraphs XXXII through XXXIV of the SECOND CAUSE OF ACTION, as previously set forth, and incorporates the same by reference herein and further alleges:

XXXVII

The defendants entered into a common design and clandestine conspiracy against the plaintiff as follows:

(1) To unlawfully remove the plaintiff as the encumbent part-time United States Magistrate for the Eastern District of Washington, at Spokane.

(2) To violate the United States Magistrate's Act, 28 U.S.C. §631.

(3) To secure the secret, unopposed and uncontested appointment of defendant Smithmore P. Myers as the new full-time

United States Magistrate for the Eastern District of Washington, at Spokane.

XXXVIII

The defendants effectuated this conspiracy by failing to properly follow the procedures set forth in 28 U.S.C. §631 and the guidelines and directives set up by the judicial conference in regards to the removal of and appointment of full-time magistrates.

XXXIX

As a direct and proximate result of the clandestine conspiracy of defendants plaintiff was unconstitutionally deprived of his established liberty and property interest without due process of law all to his damage in amounts to be proven at time of trial.

XXXX

As a further direct and proximate result of the clandestine conspiracy of defendants, plaintiff sustained severe

mental and emotional distress, pain, anguish, humiliation, embarrassment and stigma as pertains to his competency, integrity, reputation and capacity to carry out his duties of public office, creating innuendos and implications reflecting falsely on his physical and mental capablities all to his damage in amounts to be proven at time of trial.

XXXXI

As a further direct and proximate result of defendant's clandestine conspiracy plaintiff sustained wage losses in his position as magistrate plus other benefits incidental thereto and loss of plaintiff's expected contractual relationships with the United States Government all to his damage in amounts to be proven at time of trial.

XXXXII

As a further direct and proximate result of the clandestine conspiracy of the defendants plaintiff has also incurred and

will continue to incur substantial costs, expenses and attorney fees in amounts to be proven at time of trial.

FOURTH CAUSE OF ACTION

As and for a FOURTH CAUSE OF ACTION the plaintiff realleges the allegations of paragraphs I through XXVIII of plaintiff's FIRST CAUSE of ACTION, and realleges paragraphs XXXII through XXXIV of plaintiff's SECOND CAUSE of ACTION, and realleges paragraphs XXXVII and XXXVIII of plaintiff's THIRD CAUSE of ACTION, as previously set forth, and incorporates the same by reference herein and further alleges:

XXXXIII

The acts of the defendants, previously alleged, constituted discrimination against plaintiff in removal of Plaintiff from his part-time position as United States Magistrate without cause and without any hearing.

XXXXIV

The defendants arbitrarily and capriciously denied plaintiff government employment and secretly secured the full-time position of United States Magistrate for the defendant Smithmore P. Myers.

XXXXV

The acts of the defendants hereinabove alleged violated the civil rights of plaintiff under 28 U.S.C. § 1981 and § 1983, all to his damages to be proven at the time of trial.

FIFTH CAUSE OF ACTION

As and for a FIFTH CAUSE OF ACTION against the defendants, the plaintiff realleges the allegations of paragraphs I through XXVIII of the plaintiff's FIRST CAUSE OF ACTION, and realleges paragraphs XXXII through XXXIV of plaintiff's SECOND CAUSE OF ACTION, and realleges paragraphs XXXVII and XXXVIII of plaintiff's THIRD

CAUSE OF ACTION, as previously set forth, and incorporates the same by reference herein and further alleges:

XXXXVI

The actions of the defendants denied the plaintiff equal rights to protection under the laws of the United States and Constitution of the United States.

WHEREFORE, having fully set forth his causes of action known against the defendants plaintiff prays for judgment against them jointly and severally as follows:

(1) For damages resulting from defendant's unconstitutional deprivation of plaintiff's established liberty interest and property interest in the sum of over $720,000.00;

(2) For damages resulting from defendant's wrongful removal of the plaintiff from the position of part-time United States Magistrate in the sum of over

$100,000.00 plus insurance and medical benefits incidental thereto;

(3) For general damages suffered by the plaintiff in amounts to be proven at time of trial;

(4) For attorney fees, costs and expenses in the amount to be proven at time of trial;

(5) For such other and further relief as the Court deems just and equitable.

/s/ Victor J. Felice
VICTOR J. FELICE

STATE OF WASHINGTON §
§ ss.
COUNTY OF SPOKANE §

VICTOR J. FELICE, being first duly sworn upon oath deposes and states as follows:

I am the plaintiff in the above-entitled action. I have read the foregoing complaint and verily believe the same to be true.

/s/ Victor J. Felice

VICTOR J. FELICE

SUBSCRIBED AND SWORN to before me this 22 day of November, 1982.

/s/ Barbara Eiden

NOTARY PUBLIC in and for the State of Washington, residing at Spokane

APPENDIX D

IN THE SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

VICTOR J. FELICE	§	
	§	
Plaintiff,	§	NO. C 82-400 RJM
	§	(NO. 822012984)
vs.	§	
	§	
	§	AMENDED COMPLAINT
ESTATE OF MARSHALL	§	FOR DAMAGES FROM
NEILL, J. ROBERT	§	DEFENDANTS INTERFER-
FALLQUIST, JANE DOE	§	ENCE WITH BUISINESS
FALLQUIST, husband	§	RELATIONSHIPS, OUT-
and wife, SANDY	§	RAGEOUS CONDUCT AND
SANDULO AND SMITH-	§	CONSPIRACY
MORE P. MYERS	§	
	§	
Defendants.	§	

COMES NOW the plaintiff, VICTOR J. FELICE, and for his FIRST CAUSE OF ACTION against the defendants alleges as follows:

I

Plaintilff is a resident of Spokane County, State of Washington.

II

Marshall Neii, now deceased, at all

times relevant hereto was a resident of Spokane County, State of Washington.

III

Defendant, J. Robert Fallquist is a resident of Spokane County, State of Washington. All acts or omissions of defendant J. Robert Fallquist alleged herein were done on behalf of and for the benefit of his marital community.

IV

Defendant Sandy Sandulo is a single person and at all times relevant hereto was a resident of Spokane County, State of Washington.

V

Defendant Smithmore P. Myers is a single person and at all times relevant hereto has been a resident of Spokane County, State of Washington.

VI

On the 25th day of July, 1956, plaintiff was appointed by Federal District

Court Judge Samual Driver to a four year term as United States Commissioner for the Eastern District of Washington, at Spokane. On July 25, 1960, the plaintiff was reappointed for an aditional four year term as the part-time United States Commissioner for the Eastern District of Washington, at Spokane, by Federal Judge Charles Powell. On July 21, 1964, Judge Charles Powell reappointed the plaintiff as the United States Commissioner for an additional four year term. On July 18, 1968, Federal Judge Charles Powell again reappointed the plaintiff to his fourth consecutive term as United States Commissioner for the Eastern District of Washington, at Spokane.

VII

In October of 1968, The Congress of the United States enacted the United States Magistrates Act which converted the positions of United States Commissioners to positions of United States Magistrates.

VIII

On March 31, 1971, United States District Court Judge Charles Powell appointed the plaintiff to a four year term as the first United States Maistrate for the Eastern District of Washington, at Spokane.

IX

On January 24, 1975, the plaintiff was reappointed to an additional four year term as part-time United States Magistrate for the Eastern District of Washington, at Spokane, by Federal District Court Judges Marshall Neill and William Goodwin.

X

On January 24, 1979, the plaintiff was reappointed for a four year term as the part-time United States Magistrate for the Eastern District of Washington.

XI

The plaintiff, on February 1, 1979, commenced his four year term as part-time United States Magistrate at an annual salary

of $21,600.00, with medical coverage, and an opportunity to increase his government retirement pension upon completion of his duly appointed four year term of office.

XII

On or about May 7th, 1979, after 22 years of service as the United States Commissioner and United States Magistrate for the Eastern District of Washington, at Spokane, the plaintiff was notified he was to be removed from his position, without cause, and that the defendant Smithmore P. Myers was to become the new full-time United States Magistrate.

XIII

At the time the plaintiff was appointed to his fourth term as part-time magistrate he had a valid business relationship and business expectancy with the United States Government in that the appointment was for a four year term as provided in 28 U.S.C. §631.

XIV

The defendants knew or should have known of this relationship and intentionally interferred by inducing or causing the breach and termination of the business relationship and business expectancy of the plaintiff resulting in the damages to the plaintiff in amounts to be proven at the time of trial.

SECOND CAUSE OF ACTION

As and for his SECOND CAUSE OF ACTION against the defendants, the plaintiff realleges paragraphs I through XIV, as previously set forth, and incorporates the same by reference herein and further alleges:

XV

The defendants entered into a common design and clandestine conspiracy against the plaintiff as follows:

(1) To unlawfully remove the plaintiff as the incumbent part-time United States

Magistrate for the Eastern District of Washington, at Spokane.

(2) To violate the United States Magistrate's Act, 28 U.S.C. §631.

(3) To secure the secret, unopposed and uncontested appointment of defendant Smithmore P. Myers as the new full-time United States Magistrate for the Eastern District of Washington.

XVI

The clandestine conspiracy by the defendants resulted in the summary removal of plaintiff, by subterfuge, from his four year part-time position as United States Magistrate and secured the unopposed secret appointment of the defendant Smithmore P. Myers to the newly created position of full-time United States Magistrate, at Spokane, at an approximate salary of $50,000.00 per annum.

XVII

As a direct and proximate result of the

clandestine conspiracy of defendants plaintiff was unconstitutionally deprive of his established liberty interest and property interest in his part-time magistrate position all to his damage in amounts to be proven at time of trial.

XVIII

As a further direct and proximate result of defendants' clandestine conspiracy plaintiff sustained severe mental and emotional distress, pain, anguish, humiliation, embarrassment and, stigma as pertains to his competency, integrity, reputation and capacity to carry out his duties of public office, creating innuendos and implications reflecting falsely on his physical and mental capablities all to his damage in amounts to be proven at time of trial.

XIX

As a further direct and proximate result of defendants' clandestine conspiracy

plaintiff sustained loss of his position as magistrate and the resulting wage loss plus, benefits incidental thereto, and loss of expected contractual relationships with the United States Government all to his damage in amounts to be proven at time of trial.

XX

As a further direct and proximate result of the clandestine conspiracy of the defendants plaintiff has also incurred and will continue to incur substantial costs, expenses and attorney fees in amounts to be proven at time of trial.

THIRD CAUSE OF ACTION

As and for a THIRD CAUSE OF ACTION, plaintiff realleges paragraphs I through XIV of the FIRST CAUSE OF ACTION, and paragraphs XV and XVI of the SECOND CAUSE OF ACTION, as previously set forth, and incorporates the same by reference herein and further alleges:

XXI

Prior to the unlawful removal of plaintiff as part-time magistrate plaintiff occupied a position of honor and respect and faithfully, dilegently and completely carried out the duties of his office.

XXII

On or about May 7, 1979, the plaintiff was suddenly and needlessly thrusted into a position of dishonor, disrespect and embarrassement all without prior notice or for good cause.

XXIII

The intentional conduct of the defendants was to secure the removal of the plaintiff as the incumbent part-time United States Magistrate for the Eastern District of Washington, at Spokane, without any cause enumerated by law, and without any hearing authorized by law under 28 U.S.C. §631 (i).

XXIV

The defendants knew or should have

known of the proper method of informing a magistrate of any problems in his work product; of the proper method of removing a part-time magistrate; and of the proper method of appointing a full-time magistrate while the incumbent is a part-time magistrate.

XXV

The defendants knew or should have known that their actions, as alleged herein, were outrageous and beyond reasonable bounds of decency and would cause the plaintiff severe emotional distress, anguish and humiliation.

XXVI

The outrageous conduct of the defendants resulted in damages to the plaintiff which will be proven at time of trial.

WHEREFORE, plaintiff prays for judgement against the defendants jointly and severally as follows:

(1) For loss of income resulting from the wrongful removal of the plaintiff by the defendants from his position as part-time United States Magistrate in an amount to be proven at time of trial;

(2) For damages resulting from the wrongful interference with plaintiff's existing and future contractual relationship with the United States Governement in an amount to be proven at time of trial;

(3) For damages resulting from the outrageous conduct by defendants;

(4) For general damages in an amount to be proven at time of trial;

(5) For attorney fees, costs and expenses in a sum to be proven at time of trial;

(6) For such other and further relief as the court may deem just and equitable.

DATED this 22 day of November, 1982.

/s/ Victor J. Felice
VICTOR J. FELICE

STATE OF WASHINGTON §
§ ss.
COUNTY OF SPOKANE §

VICTOR J. FELICE, being first duly sworn upon an oath deposes and states as follows:

I am the plaintiff in the above entitled action. I have read the foregoing complaint and verily believe the same to be true.

/s/ Victor J. Felice
VICTOR J. FELICE

SUBSCRIBED AND SWORN to before me this 22 day of November, 1982.

/s/ Barbara Eiden
NOTARY PUBLIC in and for the State of Washington, residing at Spokane

APPENDIX E

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, September 15-16, 1977

CHANGES IN MAGISTRATE POSITIONS:

Fourth Circuit. Western District North Carolina (1) Discontinued the part-time magistrate position at Stateville at the expiration of the current term of the incumbent.

Tenth Circuit, District of Colorado (2) Discontinued the part-time magistrate position at Sterling, effective upon the expiration of the current term of the incumbent.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, September, 21, 22, 1978

SELECTION OF MAGISTRATES

Page 69: The Conference was informed that the Senate-passed bill, S. 1613, relating to

the jurisdiction of magistrates, would require the Judicial Conference to promulgate procedures and standards to be followed by the courts in the selection of magistrates. These procedures and standards would supersede the guidelines previously approved by the Conference. A bill under consideration in the House of Representatives, however, would require the use of "magistrate selection panels" by the district courts.

In view of the likelihood of the enactment of legislation during the current session of the Congress, the Committee has requested the staff of the Administrative Office to provide copies of the pending legislation and the Conference's previously-approved selection guidelines to those district courts which will be appointing or reappointing magistrates in the next several months. Specifically, the district courts are being advised to comply with the

selection procedures set forth in the House bill in order to insure the validity of pending appointments in the event the House version of the bill is enacted.

Sixth Circuit, Western District of Kentucky: (3) Discontinued the part-time magistrate position at Mammoth Cave National Park upon the expiration of the incumbent's current term.

Eighth Circuit, Western District of Arkansas. (4) Discontinued the part-time position at Fayetteville upon the expiration of the incumbent's current term.

Eighth Circuit, District of Minnesota: (3) Discontineud the part-time magistrate position at International Falls at the expiration of the incumbent's term.

Ninth Circuit, Eastern District of Washington: (1) Converted the part-time magistrate position at Spokane to full-time status. (2) Continued the part-time magistrate position at Yakima for an

additional four-year term. (3) Decreased the salary for the part-time magistrate position at Yakima from $21,600 to $7,650 per annum, effective upon the appointment of the full-time magistrate at Spokane.
(4) Continued the part-time magistrate positions at Spokane and Yakima, each at the currently authorized salary of $21,600 per annum, until the appointment of the full-time magistrate at Spokane.

Tenth Circuit, Western District of Oklahoma: (5) Discontinued the part-time magistrate position at "Enid or Ponca City" upon the expiration of the incumbent's current term.

Tenth Circuit: District of Wyoming: (5) Discontinued the part-time magistrate position at Laramie upon the expiration of the incumbent's current term.

APPENDIX F

March 1978

STANDARDS AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES

AND

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TRANSMITTAL 32, (Volume I) January 10, 1979.

COURT ACTION

I. PUBLIC NOTICE

(A) In the case of a new appointment or if the present magistrate is not selected by the district judges for reappointment, the court should make a public announcement of the vacancy. The public notice should be published in a Bar Journal, Newsletter local legal periodical, or general local newspaper or similar publication and should be filed and posted in the district clerk's office. The publich announcement should describe the

duties of the position, the qualification standards, and the procedure for submission of applications, including the name and address of the person to whom applications should be submitted.

(B) The public notice should specify that applications are to be submitted only by the potential nominee personally, indicating the person's willingness to serve if selected.

REPORT TO CHIEF JUDGE

B-(2) If the majority of the district judges does not recommend the reappointment of the present magistrate, then the commission should, within ninety days after notification of the vacancy, report to the Chief Judge the results of its activities, including its determination as to the five persons whom the commission considers best qualified to fill the vacancy

(C) When a part-time magistrate position is upgraded to full-time, the

incumbent part-time magistrate should be subject to consideration for the full-time position as if he were a full-time magistrate whose term was expiring.

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

IN RE MAGISTRATES)
(Misc. No.
)
(ORDER REAPPOINTING
) PARTTIME MAGISTRATE
- - - - - - - - - - - - ((Spokane)

It is ORDERED that Victor J. Felice be, and he is hereby, reappointed parttime United States Magistrate with headquarters in Spokane, for a term commencing February 1, 1979, and ending January 31, 1983, or at such earlier date as a full-time magistrate in Spokane may be appointed.

DONE BY THE COURT this 24th day of January, 1979.

/s/ Marshall Neill
Chief Judge

/s/ Jack E. Tanner
Judge

APPENDIX H

May 7, 1979

United States District Court
Eastern District of Washington
950 United States Courthouse
P.O. Box 2135
Spokane, WA 99210

Victor J. Felice
Attorney at Law
1655 Paulsen Building
Spokane, Washington 99201

Dear Mr. Felice:

The Administrative Office of the United States Courts has granted authority for the immediate appointment of a full-time

Magistrate for the Eastern District of Washington.

Based on personal knowledge of his ability and wide acceptance by the bar, I have nominated Smithmore Myers as full-time Magistrate, and he has accepted my offer.

My action has the unqualified endorsement of the lead members of the bar Liaison Committee, Chief Judge Walter McGovern of the Western District, the Ninth Circuit Executive, and the Magistrate's Division of the Administrative Office.

Your appointment as part-time Magistrate is conditioned to terminate upon the qualification of the full-time Magistrate.

Very truly yours,

/s/ Marshall A. Neill

Marshall A. Neill

APPENDIX I

REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STAES ESTABLISHING STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES.

Chapter 8. TRANSITIONAL PROVISION

Sec. 8.01. Pending Appointments.

Selection of nominees made prior to the effective date of these regulations shall be deemed to be made in accordance with these regulations, provided, however: (a) that the appointing court has complied with the procedures set forth in the Guidelines of the Judicial Conference for the Appointemnt of United States Magistrates which were established by the conference in March, 1977 and (b) that the nominee for appointment has been

selected pursuant to procedures which have included a public notice of any vacancy and the establishment and utilization of a merit selection panel composed of residents of the district, and (c) the nominee meets all statutory qualifications standards and requirements of the Federal Magistrates Act, as amended.